

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA**

GULF RESTORATION NETWORK, *et al.*,

Plaintiffs,

V.

LISA P. JACKSON, Administrator of the United States Environmental Protection Agency, and UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Defendants.

CIVIL ACTION

NO. 12-677

SECTION “A” (3)

JUDGE JAY C. ZAINEY

**MAGISTRATE JUDGE DANIEL E.
KNOWLES, III**

**NON-STATE INTERVENOR-DEFENDANTS' JOINT MEMORANDUM IN SUPPORT
OF EPA'S CROSS MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

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INTRODUCTION

The undersigned Intervenor represent a broad spectrum of the private sector as well as municipal wastewater utilities. We have entered into this action in support of the United States Environmental Protection Agency (“EPA” or the “Agency”) because a ruling in Plaintiffs’ favor could have sweeping, if not catastrophic, regulatory consequences in direct contravention of the statutory framework established by Congress to safeguard the waters of the United States.

Intervenor wish to impress upon this Court the unique and challenging circumstances presented by nutrient water quality issues. Determining whether nutrient levels are harmful is a highly localized, site-specific inquiry, demanding careful attention to a diversity of factors. Congress left to the states, not to EPA, the primary responsibility for setting *all* water quality standards; in the case of nutrient regulation, this cooperative federalism is particularly important. EPA acted correctly as a matter of law, past practice, and sound science when it denied Plaintiffs’ Petition because the requirements of the Clean Water Act (“CWA” or the “Act”) are better served not by federalizing numeric nutrient criteria in a majority of the 50 states but instead by continuing to collaborate with states to address nutrient problems through alternative regulatory mechanisms.

In the sections below, Intervenor seek to (i) further inform the Court of the distinct qualities of nutrients that render their regulation under the CWA a particularly complex and variable task; (ii) aid the Court in understanding the statutory framework within which water quality standards must be understood and implemented; (iii) demonstrate that Plaintiffs have failed to show that federal standards are *necessary*, as required by and within the meaning of the Act; (iv) show that Plaintiffs’ heavy reliance on *Massachusetts v. EPA* is patently misplaced; and (v) establish that EPA considered entirely permissible factors, faithfully followed long-standing past practice, and acted rationally when it denied Plaintiffs’ Petition. In 40 years of CWA administration, EPA only twice has issued water quality standards of the nature and scope

Plaintiffs seek; in both instances, the Agency acted at the express direction of Congress in statutory provisions not pertinent here. The relief Plaintiffs sought from the Administrator and now seek in this Court would be unprecedented and unfounded. For the reasons set forth below, this Court should not grant it.

BACKGROUND

I. THE REGULATION OF NUTRIENTS UNDER THE CLEAN WATER ACT POSES UNIQUE CHALLENGES.

Nutrients occur naturally in aquatic ecosystems and are necessary to support aquatic life. *See* EPA-MARB005847 at EPA-MARB005856 (Fla. Numeric Nutrient Criteria Dev. Plan) (stating that nutrients “are not only present naturally in aquatic systems, they are absolutely necessary for the proper functioning of biological communities”). While excessive nutrients can pose water quality concerns, nutrients remain fundamentally different from other water pollutants regulated by EPA and the states. Recognizing the unique nature of nutrients, EPA has consistently emphasized that states should develop nutrient criteria with the understanding that different waterbodies respond differently to changes in nutrient concentrations. *See* EPA-MARB003505 at EPA-MARB003596 (EPA Wetlands Guidance) (“[I]t is the effects of nutrients on the living components of ecosystems that should become the critical determinant of nutrient criteria, rather than the actual nutrient concentrations.”); EPA-MARB004058 at EPA-MARB004073 (EPA Rivers and Streams Guidance) (“Recognizing cause-and-effect relationships between nutrient input and general waterbody response is the first step in mitigating the effects of cultural eutrophication.”); EPA-MARB000713-15 (EPA Guidance on Stressor-Response). That sensitivity and analytical approach is critical because, unlike with other pollutants, the concentration of nutrients capable of causing biological impairment (*i.e.*, environmental harm) is highly dependent on multiple waterbody characteristics.

For example, with regard to streams, EPA has directed that nutrient levels must be set in a manner that considers the size, shape, shade cover, color, and flow of the waters in question. *See* EPA-MARB004058 at EPA-MARB004087, EPA-MARB004090, EPA-MARB004096, and EPA-MARB004147 (EPA Rivers and Streams Guidance). Likewise, EPA has recognized that a lake's biological response to nutrients is dependent upon multiple factors such as the lake's alkalinity, temperature, retention time, and depth. *See* EPA-MARB004311 at EPA-MARB004355-65 (EPA Lakes and Reservoirs Guidance); EPA-MARB000686 at EPA-MARB000703-08, EPA-MARB000713-15 (EPA Guidance on Stressor-Response). As a result, predicting the effect of a given load of nutrients on a waterbody requires a highly localized determination. *See Fla. Wildlife Fed. v. Jackson*, 853 F. Supp. 2d 1138, 1160 (N.D. Fla. 2012) ("Florida's climate, geography, waters, and demographics make the nutrient-pollution issue different in Florida than in any other state."). Without detailed information about a particular waterbody, one cannot determine whether imposing a singular, numeric nutrient standard (*e.g.*, no more than X parts per million (ppm) nitrogen allowed) will either improve that waterbody and protect its designated uses, or have no effect, or have a harmful effect.

Consistent with the statute, EPA's regulations require that water quality criteria be based on "sound scientific rationale." 40 C.F.R. § 131.11(a)(1); *see* 33 U.S.C. § 1314(a)(1); 40 C.F.R. §§ 131.11(b)(1)(iii) (requiring "scientifically defensible" methods); 131.5(a)(4) (referring to "appropriate technical and scientific data and analyses"). In accordance with this requirement, EPA's Science Advisory Board ("SAB")¹ has stressed that an understanding of the relationship

¹ The SAB, established by Congress, is a public advisory group that provides scientific information and advice to EPA. It is charged with providing balanced, expert assessment of the quality and relevance of the scientific and technical information used or proposed as the basis for EPA regulations. *See* <http://yosemite.epa.gov/sab/sabpeople.nsf/WebCommittees/BOARD>.

between nutrients and impairment “is necessary in order to assure that managing for particular nutrient levels will lead to desired outcomes.” EPA-MARB008577 at EPA-MARB008601 (SAB Review of EPA’s Empirical Approaches for Nutrient Criteria Derivation); *see id.* at EPA-MARB008603 (“There are numerous empirical examples where a given nutrient level is associated with a wide range of response values due to the influence of habitat, light levels, grazer populations, and other factors.”).² Like EPA, the SAB recognized the need to account for the many factors that can influence how waterbodies respond to nutrients when deriving nutrient criteria. *See id.* at EPA-MARB008621 (“In order to be scientifically defensible, empirical methods must take into consideration the influence of other variables.”). The Act’s assignment of principal responsibility for water quality standards to the states (discussed below) is entirely compatible with the foregoing principles.

II. THE CLEAN WATER ACT ESTABLISHES STATE PRIMACY IN THE PROTECTION OF WATER QUALITY WITHIN EACH STATE’S JURISDICTION.

In the Declaration of Goals and Policy of the CWA, Congress declared it to be the policy of the CWA to “recognize, preserve, and protect the primary responsibilities and rights of *States* to prevent, reduce, and eliminate pollution [and] to plan the development and use . . . of land and water resources.” 33 U.S.C. § 1251(b) (emphasis added); *Miss. Comm. on Nat. Res. v. Costle*, 625 F.2d 1269, 1275 (5th Cir. 1980) (“Congress did place primary authority for establishing water quality standards with the states. . . . The varied topographies and climates in the country call for varied water quality solutions.”). The Act prohibits interpretations of its provisions that

² Although these SAB statements appear within a document evaluating one particular approach to nutrient criteria derivation (*i.e.*, the stressor-response approach), the SAB emphasized the need for a “mechanistic understanding and a clear causative link between nutrient levels and impairment” to ground *any* approach to deriving numeric nutrient criteria. *See* EPA-MARB008577 at EPA-MARB008603.

would “impair [] or in any manner affect[] any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States[,]” except as otherwise “expressly provided” by the statute. 33 U.S.C. § 1370(2). The bedrock principle of safeguarding state primacy and prerogatives is central to the CWA. It is particularly critical in setting of the water quality standards that lie at the heart of this action.

A. States Have The Primary Role In Establishing Water Quality Standards For Their Own Waters.

The Act’s goal of preserving state primacy is plainly expressed in its procedures for establishing water quality standards. Section 303 provides that *states* establish water quality standards for each of their surface waters. *See id.* § 1313 (“Section 303”); *Natural Res. Def. Council v. EPA*, 16 F.3d 1395, 1399 (4th Cir. 1993) (“[P]rimary responsibility for establishing appropriate water quality standards is left to the states.”). Those standards consist of two components: “designated uses” for waterbodies and “water quality criteria.” *Id.* § 1313(c)(2)(A); *see also* 40 C.F.R. § 131.2. “Designated uses” drive the water quality goals for a particular waterbody. When establishing designated uses, states must consider a waterbody’s “use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes,” as well as its “use and value for navigation.” 33 U.S.C. § 1313(c)(2)(A); *see also* 40 C.F.R. § 131.10(a).

Once a state establishes designated uses for its waterbodies, it must adopt water quality criteria “necessary to protect” those uses. 40 C.F.R. § 131.2. States may express such criteria as numeric limits on pollutants (*e.g.*, “total nitrogen cannot exceed 1.5 mg/L”) or as “narrative statements” (*e.g.*, “no nutrients in amounts that would harm indigenous aquatic wildlife”). *See* 40 C.F.R. § 131.3(b); *see also id.* § 131.11(b)(2). For nutrients, which are uniquely complex for the reasons summarized above, narrative criteria, as adopted by numerous states and approved by

EPA, may more readily accommodate consideration of the multiple site-specific factors that drive nutrients' varying impacts on different waters.

EPA's role in this framework is also clear: to review and approve the standards promulgated by each state. *See* 33 U.S.C. § 1313(c)(3). In the case of nutrients, that is precisely what EPA has done. The Agency has expressly approved state standards, including narrative standards, in jurisdictions in which Plaintiffs now seek to compel EPA to impose superseding federal standards. All ten states immediately adjacent to the Mississippi River have narrative criteria for nutrients. *See* 014-004-002 Ark. Code R. § 2.509; Iowa Admin. Code R. 567-61.3(2); Ill. Admin. Code tit. 35, § 302.203; 401 Ky. Admin. Regs. 10:03(1, 2); La. Code R. tit. 33, § 1113(A); Minn. R. 7050.0150, Subp. 3, 7050.0210; 08-030-006 Code Miss. State. R. § II(1); Mo. Code Regs. tit. 10, § 20-7.030(3); Tenn. Comp. R. & Regs. § 1200-4-3-.02; Wis. Admin. Code § 102.04.

B. The Act Gives EPA Authority To Establish Water Quality Standards In Only Limited Circumstances.

The CWA gives EPA a decidedly secondary role in the establishment -- as distinct from the review and approval -- of water quality standards. *See City of Albuquerque v. Browner*, 97 F.3d 415, 425 (10th Cir. 1996). In particular, Congress limited EPA's authority to establish federal water quality standards to two specific circumstances:

It may act only where (1) it determines that a state's proposed new or revised standard does not measure up to CWA requirements *and* the state refuses to accept EPA-proposed revisions to the standard or (2) a state does not act to promulgate or update a standard but, in the EPA's view, a new or revised standard is necessary to meet CWA muster.

Am. Paper Inst. v. EPA, 996 F.2d 346, 349 (D.C. Cir. 1993) (citing 33 U.S.C. §§ 1313(c)(3)-(4)) (emphasis in original).

At the heart of this lawsuit is the second circumstance, wherein Congress has authorized the Administrator to propose and adopt a revised or new standard “in any case where the Administrator determines that a revised or new standard is necessary to meet the requirements of [the CWA].” 33 U.S.C. § 1313(c)(4)(B). For federal intervention to be truly “necessary,” EPA must first find that federal water quality criteria (as opposed to other regulatory mechanisms) are *required* to address a water quality concern *and* that a particular state’s actions have failed and will continue to fail to adequately address the concern. EPA has acted under Section 303(c)(4)(B) only rarely, as Congress intended.

C. The CWA Provides The States (As Well As EPA) With Multiple Mechanisms To Address The Water Quality Concerns Raised By Plaintiffs.

Federal water quality standards are only one among multiple mechanisms available to states and EPA under the CWA to address nutrient water quality concerns. Congress provided the states with various tools to address water quality, such as: issuance of individual permits to those whose activities discharge pollutants to state waters; setting “total loading” allocations to protect specific waterbodies or segments; and establishing special state water management plans. In some instances, as with the establishment of water quality standards, EPA has some limited authority to take independent, federal action in specific circumstances of state inaction or inadequate action. In other instances, EPA lacks direct regulatory authority, but can nevertheless seek to influence state action through use of its funding authority and, in the case of water quality standards such as those at issue here, its review and approval (or disapproval) authority.

The various other CWA mechanisms reflect, in part, the distinction both in the Act and in the real world between “point” and “nonpoint” discharges into waters of the United States. A “point source” is “any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged.” 33 U.S.C. § 1362(14). Point source discharges are regulated under

the Section 402 permitting program. *See id.* § 1342 (“Section 402”).³ Common examples of point source discharges include treated wastewater from municipal and industrial facilities. States may assume primary responsibility for administering and enforcing the Section 402 permitting program upon EPA approval, and indeed most states have done so. *See id.* §§ 1342(b), 1342(c)(1).

Nonpoint sources are not defined in the CWA, but generally include any source of water pollution other than a point source discharge. *See Nat’l Wildlife Fed’n v. Gorsuch*, 693 F.2d 156, 165-66 (D.C. Cir. 1982). Nonpoint sources may be regulated by the states, but “nothing in the CWA demands that a state adopt a regulatory system for nonpoint sources.” *Defenders of Wildlife v. EPA*, 415 F.3d 1121, 1124 (10th Cir. 2005). Common examples of nonpoint sources include overland storm runoff from various land uses, including urban development, agriculture, and forestry.

1. Individual Point Source Permits Must Protect Water Quality.

For point source discharges, the primary means for states to achieve their own water quality standards and address water quality concerns is the EPA-approved state authority to implement the National Pollutant Discharge Elimination System (“NPDES”) permit program under CWA Section 402. *See* 33 U.S.C. §§ 1311, 1342. Every NPDES permit contains specific wastewater discharge limitations; often these limits are set to achieve and maintain water quality standards. Individual permits may also include narrative commands such as: “no visible foam shall be discharged by the permittee.” Although EPA has approved administration of the

³ Section 301 prohibits any discharge of a pollutant from a point source to a water of the United States without a permit. 33 U.S.C. § 1311. Section 402 authorizes the issuance of permits to point sources. *Id.* § 1342. The Act provides for implementation of this vital and comprehensive permitting program by individual states, upon EPA approval of the states’ permitting programs. *See id.* § 1342(b).

NPDES permitting program by almost every state, the Agency retains oversight authority with respect to all such permitting. *See id.* § 1311(b)(1)(C). EPA may object to a state-issued Section 402 permit that does not comply with the CWA, and may do so on the basis that the permit limit does not properly “implement [or meet] any applicable water quality standard.” *See id.* § 1342(d)(2). For example, if an upstream state, *e.g.*, Minnesota, proposes to issue a permit containing limits that would cause a violation of the applicable water quality standards of a downstream state, *e.g.*, Tennessee, EPA may object to the issuance of that permit. *See Arkansas v. Oklahoma*, 503 U.S. 91, 102-03 (1992).

There are over 90,000 active, individual NPDES permits in the United States, and EPA either issues or has an opportunity to review every one of them. *See* <http://www.epa.gov/enviro/facts/pcs-icis/search.html>. In this first-line defense of public waters, adherence to and achievement of state water quality standards is one of the primary functions of this vast permitting program.

2. Total Maximum Daily Loads Implement Water Quality Standards.

States also address regulated pollutants through the establishment of total maximum daily loads (“TMDLs”) under Section 303(d) of the CWA. *See* 33 U.S.C. § 1313(d). Section 303(d) requires each state to (i) identify those waters “within its boundaries” for which limitations on point source discharges are not stringent enough to implement the water quality standards “applicable to such waters” (so-called impaired waters) and (ii) establish a priority ranking of these waters. *Id.* § 1313(d)(1)(A). For each listed (“impaired”) water, the state must establish a TMDL for pollutants that EPA has identified on a general basis as “suitable for such calculation.” *Id.* § 1313(d)(1)(C). The Act does not define “total maximum daily load,” but it directs that a TMDL be established “at a level necessary to implement the applicable water quality standards.” *Id.*

In a nutshell, a TMDL is a waterbody-specific determination of allowable pollutant concentrations that are supportive of a state's designated uses for that particular waterbody. *See* 40 C.F.R. § 130.7(c)(1). As with water quality standards, EPA has the authority to step in and promulgate a TMDL on behalf of a state in limited circumstances. States, however, retain responsibility over TMDL implementation, even in instances where EPA establishes the total load itself. *See Sierra Club v. Meiburg*, 296 F.3d 1021, 1031 (11th Cir. 2002). Indeed, states retain the flexibility to choose “both if and how [they will] implement . . . TMDL[s].” *Pronsolino v. Nastri*, 291 F.3d 1123, 1140 (9th Cir. 2002). Under this framework, states may implement TMDLs using a variety of mechanisms to achieve the targeted pollutant reductions from point and nonpoint sources. EPA notes that “[o]ver 5,000 nutrient-related TMDLs have been completed throughout the 31 [Mississippi-Atchafalaya River Basin] states at levels necessary to attain and maintain the applicable narrative and numeric water quality standards.” EPA-MARB000001 at EPA-MARB000005 (Denial at 5). All TMDLs are subject to express federal review and approval. *See* 33 U.S.C. § 1313(d)(2).

3. States Have Other Programs To Achieve Water Quality Standards Through Plans For Controlling Point And Nonpoint Sources.

Reductions in nonpoint source pollution can be attained through state programs, aided by the Section 319 planning and grant funding program. *See* 33 U.S.C. § 1329 (“Section 319”). The Act assigns the states responsibility for preparing waste treatment management plans (33 U.S.C. § 1288), non-point source management plans (33 U.S.C. § 1329), and for a continuing planning process (33 U.S.C. § 1313(e)), “which is essentially a plan for how the state is going to clean up pollution.” *Meiburg*, 296 F.3d at 1026. Although states are responsible for managing pollution from nonpoint sources, EPA may influence such management through grant funding.

See Pronsolino v. Marcus, 91 F. Supp. 2d 1337, 1355 (N.D. Cal. 2000). These state programs are well situated to address nutrient issues with site-specific efforts.

ARGUMENT

I. PLAINTIFFS FAIL TO SHOW THAT SECTION 303(C)(4)(B)’S DEMANDING PREDICATE OF NECESSITY IS SATISFIED IN ANY MRB STATE, MUCH LESS ALL OF THEM.

A. The Requirement That The Administrator Find Federal Intervention “Necessary” Is A Meaningful One That Plaintiffs Cannot Ignore.

There is no dispute that Section 303(c)(4)(B) of the CWA requires EPA to determine that federal water quality standards are *necessary* before acting to supplant a state’s role in that realm. *See Fla. Wildlife Fed’n, Inc. v. S. Fla. Water Mgmt. Dist.*, 647 F.3d 1296, 1300 (11th Cir. 2011); *Nat’l Wildlife Fed’n v. Browner*, No. 95-1811, 1996 WL 601451, at *5 (D.D.C. Oct. 11, 1996) (“Section 303(c)(4)(B) . . . expressly confers such authority [to supplant a state standard] on the Administrator, but its applicability is triggered by an exercise of the Administrator’s discretion.”). Neither the CWA nor applicable regulations define the term “necessary” in the context of Section 303(c)(4)(B), and there is no CWA case law interpreting the term.

“Necessary” certainly means something more than merely “appropriate,” a term Congress has employed elsewhere in the CWA, but chose not to employ in Section 303(c)(4)(B). *See, e.g.*, 33 U.S.C. § 1342(a)(2) (providing for the Administrator to prescribe the permit conditions “he deems appropriate”). The plain meaning of “necessary” is well stated in various dictionaries. *See, e.g.*, Oxford English Dictionary (“1.a. Indispensable, vital, essential; requisite. . . .”); Webster’s Third New International Dictionary (“that cannot be done without: that must be done or had: absolutely required”). Those commonly understood meanings impose an insurmountable hurdle to both Plaintiffs’ Petition and this action, because Plaintiffs do not demonstrate that federal numeric nutrient criteria (“NNC”) are indispensable in *any* state.

The Supreme Court’s ruling in *AT&T Corp. v. Iowa Utilities Board* is instructive on the pertinent meaning of the term “necessary.” 525 U.S. 366 (1999). In that case, the Court addressed whether another federal agency had so distorted the ordinary meaning of “necessary” as employed in one of its governing statutes that the agency had violated its statutory responsibility. At issue was a Federal Communications Commission (“FCC” or “Commission”) interpretation of a statutory provision directing the Commission, in evaluating whether telephone carriers must grant other companies access to certain proprietary network elements, to consider “whether . . . access to such network elements . . . is *necessary*.” *Id.* at 388 (emphasis added) (quoting 47 U.S.C. § 251(d)(2)).

The FCC, in construing “necessary,” had “announced that it would regard the ‘necessary’ standard as having been met regardless of whether ‘requesting carriers can obtain the requested proprietary element from a source other than the incumbent,’ since ‘[r]equiring new entrants to duplicate unnecessarily even a part of the incumbent’s network could generate delay and higher costs for new entrants, and thereby impede entry by competing local providers’” *Id.* at 388-89 (internal quotations and alterations in *AT&T*). The Supreme Court spoke plainly: the FCC’s interpretation of the term “necessary . . . is simply not in accord with the ordinary and fair meaning” of the term. *Id.* at 389-90. By disregarding whether the desired resources could be otherwise obtained, the Commission “had not interpreted the terms of the statute in a reasonable fashion.” *Id.* at 389, 392. *AT&T* thus stands for the commonsensical proposition that “necessary” requires that something be *needed* because alternatives are lacking -- not merely that it be more desirable than alternatives.

Under the CWA, the manifest intent of Congress that the states, in the first instance, have the responsibility to set water quality standards can be fulfilled only by giving the term

“necessary” the same fair and consequential meaning in Section 303(c)(4)(B) that the Supreme Court gave the term in *AT&T*. A less rigorous prerequisite for federal criteria would neuter the cooperative federalism expressed in the Act and in Section 303(c)(4)(B), in particular. For example, if EPA could act whenever federal water quality criteria would be useful or desirable -- the very same basis upon which a state might act -- there would be no state primacy whatsoever. Under its longstanding interpretation, however, EPA has unequivocally stated that its proper role is truly necessity-driven, having termed federal promulgation of water quality standards both “a course of last resort” and “symptomatic of something awry with the basic statutory scheme.” Water Quality Standards; Establishment of Numeric Criteria for Priority Toxic Pollutants; States’ Compliance, 57 Fed. Reg. 60,848, 60,858 (Dec. 22, 1992). Absent such dire circumstances in which federal action is *necessary*, the CWA places the establishment of water quality standards squarely in the hands of the states, subject to federal review and approval.

B. Plaintiffs Have Established Neither That EPA Made A Necessity Determination Nor That Such Necessity Exists.

Plaintiffs acknowledge that the Administrator has not issued a necessity determination for any Mississippi River Basin (“MRB”) state. *See* Pls’ Br. at 33 (Doc. 133-2) (commenting on “EPA’s failure to make a necessity determination” (capitalization altered) and on “EPA’s refusal to determine . . . that numeric nutrient criteria are necessary”). Plaintiffs, instead, pay this requirement little heed, essentially asking this Court to side-step this requisite process and referring to “*necessity determination-like pronouncements*,” as if something less than an actual determination had legal consequence under Section 303(c)(4)(B). *Id.* at 29 (emphasis added). Plaintiffs’ obfuscation notwithstanding, necessity is a fundamental predicate to EPA action. Plaintiffs have not demonstrated that it exists in even a single state, nor is there record evidence

sufficient for this Court to conclude that federal action is *necessary* in *any* of the following states (all of which are in the Mississippi River Basin):

Alabama	Nebraska
Arkansas	New Mexico
Colorado	New York
Georgia	North Carolina
Illinois	North Dakota
Indiana	Ohio
Iowa	Oklahoma
Kansas	Pennsylvania
Kentucky	South Dakota
Louisiana	Tennessee
Maryland	Texas
Michigan	Virginia
Minnesota	West Virginia
Mississippi	Wisconsin
Missouri	Wyoming
Montana	

See Petition, Doc. 1-1 at 14.⁴

In none of these states have Plaintiffs demonstrated that federal *numeric* nutrient criteria are needed to address existing water quality problems in any particular class of waterbodies (*e.g.*, lakes, streams, canals, estuaries, coastal waters, or other surface waterbodies). Plaintiffs similarly have failed to demonstrate that the current, proposed, and planned programs administered by any state are inadequate to address specific problems in the specific waters of any specific state. That failure alone is dispositive of their action here.

⁴ In an attempt to salvage their hopelessly overbroad Petition, Plaintiffs reduce the number of states referenced in their Complaint to ten. *See* Doc. 22 at 16. Plaintiffs' claims suffer the same problems, however, whether applied to ten, 31, or 50 states, the latter two of which are identified as alternatives for the scope of federal action sought in their Petition.

C. Plaintiffs Fatally Ignore That EPA Must Find That A Particular State Is Not Doing Its Job Before Taking Action Under Section 303(c)(4)(B).

Both as a matter of logic and statutory construction, the Administrator must determine necessity on a state-by-state basis. Notwithstanding Plaintiffs' sweeping assertions about nutrients in broad regions of the United States, the CWA provides no basis for the Administrator to circumvent the required state-specific analyses. Rather, as discussed in Background Section II, *supra*, the CWA prescribes -- clearly and repeatedly -- that each state has the primary duty of issuing water quality criteria for *that* state. *See* 33 U.S.C. §§ 1313(c)(1) (discussing review of "applicable water quality standards" by "[t]he Governor of a State or the State water pollution control agency of such State"); (c)(2)(A) (discussing submission to the Administrator of "revised or new water quality standard[s]" by "the State"); (c)(3) (referring to "the water quality standard for the applicable waters of that State"); 40 C.F.R. § 131.11 (establishing procedures for each state's establishment of *state* water quality criteria).

When *necessary* to fulfill the broad purposes of the CWA, EPA may step into the shoes of a state and issue water quality standards ("WQS") for waters of that state. *See* 33 U.S.C. § 1313(c)(4)(B). An EPA determination that federal WQS are necessary for a state, however, requires not only a finding that there is a water quality problem that a state is required to address -- environmental necessity -- but also a finding that, considering the totality of available state mechanisms, that state has failed to address the water quality problem -- administrative necessity.⁵ This requirement -- that EPA conclude there is an administrative necessity for federal intervention -- flows both from the procedures described in Section 303 and from the

⁵ Intervenor's do not mean to suggest that *two* separate determinations are required under Section 303(c)(4)(B); rather, these two elements of necessity, in this context, must co-exist in a proper determination.

overarching federalist principles of the Act. Under Section 303, as discussed above, states propose water quality criteria in the first instance, subject to EPA review and approval. EPA may establish federal criteria only where the Agency disapproves state-proposed criteria or where states fail to propose criteria. *See* Section III(A), *infra*. Thus, EPA cannot find federal criteria to be *necessary* absent an analysis of the adequacy of proposed or existing water quality programs *in that state*. *Cf. AT&T*, 525 U.S. at 392.

Any fair and proper statutory construction of the CWA compels the conclusion that there must be something more than the mere existence of an environmental problem -- the trigger for state action -- for *federal* action to be “necessary” under Section 303(c)(4)(B). The federalist structure of the CWA authorizes EPA to intervene only after it has concluded that the state cannot be relied upon to fulfill its primary responsibility to address water quality. Any other interpretation would mean that EPA must act whenever there is a water quality problem, effectively nullifying the Act’s express provisions that place primary responsibility for water quality regulation on the states.

Plaintiffs offer the Court no basis for concluding that EPA may bypass a state-by-state analysis and issue a sweeping declaration that federal NNC are “necessary” in *every* state within the MRB -- which Plaintiffs allege could be as many as ten, 31, or 50 states. Plaintiffs’ subjective opinion that several states have nutrient problems and also lack one or more effective regulatory programs to address those problems is not a substitute for a specific factual determination by EPA that federal action in each state is “necessary” -- not merely appropriate, desirable, useful, or a good idea.

The record in this case is insufficient to demonstrate necessity in even a single state within Plaintiffs' varying collections of target states -- ten, 31, or 50 states.⁶ See Pls' Br. at 38 (Doc. 133-2). It is not enough for Plaintiffs to allege that different states contribute different percentages of nutrients and to point to different states' alleged shortcomings in developing NNC. See Doc. 1-1 at 14, 55-71. To prevail in this action, Plaintiffs must demonstrate, *inter alia*, that federal NNC are the only viable regulatory option *in each state* for which they request relief. See *AT&T*, 525 U.S. at 392. They have not made such a showing.⁷

Injecting the blunt, sweeping, one-size-fits-all remedy preferred by Plaintiffs into the highly site-specific and complex arena of nutrient water quality management throughout the vast Mississippi River Basin would violate the CWA, which gives states the prerogative to develop their own water quality standards and related solutions. EPA rightly has recognized this. See EPA-MARB000680 at EPA-MARB000681 (Letter from EPA Acting Assistant Administrator to Regional Administrators, March 16, 2011, at 2) ("States need room to innovate and respond to local water quality needs, so a one-size-fits-all solution to nitrogen and phosphorus pollution is neither desirable nor necessary."); *Env'tl. Def. Fund, Inc. v. Costle*, 657 F.2d 275, 294 (D.C. Cir. 1981) ("[I]t is logical that EPA should refrain from acting [to fulfill its 303(c)(4)(B) duties] until

⁶ Plaintiffs also refer to the possibility of issuing NNC for one or two states, Pls' Br. at 33 (Doc. 133-2), and elsewhere discuss collections of seven and nine states, see Doc. 1-1 at 56-62, 63-69. Plaintiffs' ever-fluctuating specification of the states they seek to target for federal intervention underscores their inattentiveness to the four corners of the CWA -- including the Act's requirement of state-level analysis -- and reflects that Plaintiffs' true argument is for their preferred nutrient policy, not for strict statutory compliance.

⁷ To the extent Plaintiffs' complaint can be read to summarily allege administrative necessity, that contention is flatly contradicted by evidence that individual states are actively addressing excess nutrient pollution in differing ways. Of the 31 states Plaintiffs list as draining into the "Mississippi Atchafalaya River Basins," see Doc. 1-1 at 14, EPA lists 14 states as already having numeric nutrient criteria in effect. See <http://www.epa.gov/nandppolicy/progress.html> (last visited February 20, 2013).

the states have completed an initial effort to update the standards as they deem appropriate.”).

The record before the Court does not demonstrate that such federal intrusion is “necessary” here.

II. CONSISTENT WITH *MASSACHUSETTS V. EPA*, THE AGENCY BASED ITS DENIAL OF PLAINTIFFS’ PETITION ON PERMISSIBLE FACTORS.

A. This Case Is Distinguishable From *Massachusetts v. EPA*.

Plaintiffs lean heavily on their contention that *Massachusetts v. EPA* is “remarkably analogous to the situation at issue here,” Pls’ Br. at 23 (Doc. 133-2), and, on that basis alone, this Court should grant their requested relief. Plaintiffs’ crucial *Massachusetts* argument unravels instantly when Section 303(c)(4)(B) is read alongside Clean Air Act (“CAA”) Section 202(a)(1), the provision at issue in that case. *See* 42 U.S.C. § 7521(a)(1) (“CAA Section 202(a)(1)”).

Unlike the governing CWA provision, CAA Section 202(a)(1) directs EPA to make a scientific determination of risks to public health or welfare, without any regard to consideration of other factors such as the efficacy or practicality of alternative administrative responses:

[EPA] shall by regulation prescribe . . . standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, *which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.*

42 U.S.C. § 7521 (emphasis added). The CAA commands EPA to determine whether a specific pollutant creates pollution that “endanger[s] public health or welfare,” and, if so, to regulate it.

Id.; *see also Massachusetts*, 549 U.S. 497, 533 (2007) (“If EPA makes a finding of

endangerment, the [CAA] requires the agency to regulate emissions of the deleterious pollutant from new motor vehicles.”).⁸

In contrast, Section 303(c)(4)(B) of the CWA instructs EPA to conduct a far broader, indeed holistic, inquiry to determine whether, given the multiple state and federal regulatory responses that may be brought to bear on a particular state water quality problem, federal criteria for that state are necessary (absolutely needed) to achieve the purposes of the CWA as a whole:

(4) The Administrator shall promptly prepare and publish proposed regulations setting forth a revised or new water quality standard . . .

(B) in any case where the Administrator determines that a revised or new standard *is necessary to meet the requirements of this chapter*.

33 U.S.C. § 303(c)(4) (emphasis added).

Thus, in one instance, Congress directed EPA to determine whether a particular pollutant is a risk to public health or welfare, further commanding that the Agency *shall* regulate that pollutant upon such a finding. In the case of *Massachusetts v. EPA*, the Court ruled that once EPA had made such a finding, it had *no choice* but to regulate.

On the other hand, in the case before this Court, Congress unquestionably did *not* direct that EPA “shall” regulate when it determines that a pollutant is causing a problem. Rather, Congress directed (1) that the *states* shall regulate such pollutants in the water quality standard

⁸ Similar statements can be made of the statutory provision at issue in *NRDC v. FDA*, 872 F. Supp. 2d 318, 333 (S.D.N.Y. 2012). Pls’ Br. at 27 (Doc. 133-2). The statutory provision in that case required an agency determination to be based on “new evidence . . . [that] shows that such drug is not shown to be safe.” *Id.* at 335 (quoting 21 U.S.C. § 360(e)(1)(B); *see also* EPA Br. at 18. The court in that case also relied on other sections of the relevant statute that mandated agency review of clinical research as well as the agency’s regulations, which required it to base the decision at issue on a “review of scientific evidence of the drug’s safety.” *Id.* (citing 21 U.S.C. § 393(b) and quoting 21 C.F.R. § 514.80).

realm, subject to EPA review and approval; and further (2) that EPA may intervene to issue federal criteria only if it determines for a particular state that doing so is *necessary* to fulfill the requirements of the statute. Broad policy statements by EPA over the years that nutrients can present water quality problems, and support by the Agency for state efforts to develop NNC are not tantamount to the requisite finding under Section 303(c)(4)(B) that the issuance of federal criteria is necessary to fulfill the Act's purposes and goals. Simply put, unlike in the case of EPA's CAA endangerment finding, the determination that triggers a federal duty to regulate has not occurred in this instance and Plaintiffs' reliance on *Massachusetts v. EPA* is inapt and unavailing.

Section 303(c)(4)(B) does not constrain EPA's assessment of the necessity of federal action to a consideration of endangerment or to any set of factors. Rather, Section 303(c)(4)(B) provides broadly that EPA shall regulate only when it determines such regulation to be "necessary to meet the requirements" of the CWA. Rather than narrowly circumscribing EPA's inquiry as it did in CAA Section 202(a)(1), Congress here conferred broad discretion upon the Agency to examine the statute's goals and structures as a whole, as a prerequisite to issuing federal WQS. Plaintiffs' allegation to the contrary that the CWA's "plain language" "bound[s]" EPA to consider only "scientific and technical criteria" (Pls' Br. at 22) is flatly refuted by statutory language itself.

B. EPA's Denial Was Based On Permissible Factors.

Unlike the CAA provision at issue in *Massachusetts*, Section 303(c)(4)(B) permits EPA to consider a wide range of factors in determining whether and how to establish federal water quality standards. The Act expressly directs EPA to ask whether federal standards are necessary to meet the overall requirements of the entire Act, not merely the requirements of Section 303(c).

See 33 U.S.C. § 1313(c)(4)(B). This mandate calls for a wide-ranging assessment of what regulatory steps are necessary to accomplish the Act’s goals, including not only the CWA’s environmental goals, but its stated policy of state primacy in establishing water quality standards. *See* 33 U.S.C. §§ 1251(b); 1313(c). As explained above, the term “necessary” requires findings by EPA both that federal standards would be effective and that they are “indispensable” notwithstanding the availability of alternative measures and mechanisms.

EPA denied Plaintiffs’ Petition because the Agency considered ongoing collaboration with the states to be a more effective means of reducing nutrient loadings in the waters of the MRB states, and because it recognized the extraordinary logistical and technical hurdles the Agency would face were it to assume responsibility for developing numeric nutrient criteria for 50, 31, or ten states. *See* EPA-MARB000001 at EPA-MARB000003-04 (Denial at 3-4). In light of EPA’s broad mandate under Section 303(c)(4)(B) to consider the steps necessary to achieve the overall purposes of the CWA in determining if federal water quality standards are necessary, EPA’s decision was entirely reasonable.

EPA’s decision also was consistent with the statutory framework of Section 303, which utilizes EPA as a backstop to support state efforts to establish water quality standards. *See Nat’l Wildlife Fed’n v. Browner*, 127 F.3d 1126, 1131 (D.C. Cir. 1997). It would be *inconsistent* with the “requirements” of the CWA for EPA to fail to consider state efforts in deciding whether federal standards are “necessary” to redress specific states’ water quality problems.

Additionally, EPA’s analysis of the *need* for federal water quality standards must take into account the diversity of waters within a state. Different types of waters -- *e.g.*, lakes, streams, springs, and estuaries -- respond differently to nutrients, and so their regulatory needs are different. The CWA’s requirement that water quality criteria be based on sound science

therefore requires that necessity be analyzed independently for discrete waterbody types. *See* 40 C.F.R. § 131.11(a)(1). Plaintiffs’ failure to acknowledge and address these principles in any meaningful way represents another flaw in their action. In contrast, EPA acted faithfully in respect of its CWA obligation to differentiate among types and classes of waters when it concluded, essentially, that it had no basis to undertake *properly* the extraordinary scope of rulemaking for which Plaintiffs petitioned.

Finally, EPA was well within its authority when it took into account the unprecedented administrative and resource demands that would flow from granting Plaintiffs’ requested course of action. EPA-MARB000001 at EPA-MARB000004 (Denial at 4). Plaintiffs argue that EPA was forbidden from considering administrative burdens in denying their Petition and assail the Denial as having failed to consider the full range of regulatory actions requested in the alternative in the Petition. Pls’ Br. at 32-33 (Doc. 133-2). Viewed closely, however, this argument ultimately rests on Plaintiffs’ misplaced reliance on *Massachusetts v. EPA*. Importantly, in *Massachusetts v. EPA*, the Supreme Court made clear that the circumstances in that case reflected the exception to the rule it “[has] repeated time and again, [that] an agency has broad discretion to choose how best to marshal its limited resources and personnel to carry out its delegated responsibilities.” 549 U.S. at 527.

In *Massachusetts v. EPA*, the particular terms of CAA Section 202(a)(1) “constrain[ed] agency discretion to pursue other priorities” as a matter of “congressional design” because EPA had no discretion to “avoid taking further action” unless “its reasons for action or inaction [] conform to the authorizing statute.” *Id.* at 533. As shown above, Section 303(c)(4)(B) contains no similar constraint. EPA’s justifications for rejecting the Petition were anchored broadly in the overall “requirements” of the CWA, including those that specify that states have primary

responsibility for setting water quality standards and that EPA follow the requirements of sound science. EPA's reasons for rejecting Plaintiffs' Petition "conform to the authorizing statute." Accordingly this case falls within the general rule that an agency has "broad discretion to choose how best to marshal its limited resources and personnel to carry out its delegated responsibilities." *Massachusetts*, 549 U.S. at 527, 533.

III. EPA'S DENIAL OF THE PETITION WAS REASONABLE AND CONSISTENT WITH YEARS OF CWA ADMINISTRATION.

In their Petition, Plaintiffs assert that EPA *must* take truly radical action. Plaintiffs argue that EPA must issue specific numeric limits for naturally occurring compounds in all surface waters on a national basis and without regard for the unprecedented scientific and administrative complexity presented by the environmental conditions they describe. EPA-MARB000007 at EPA-MARB000079 (Petition at 72) ("this is a case in which water quality standards should be established by EPA on a national basis"). *See also supra* Background Section I. EPA properly rejected the Petition because to pursue such national numeric criteria for nutrients would be a "daunting" and "unprecedented" challenge at cross-purposes with multiple state and EPA efforts already underway in the Mississippi River Basin. EPA-MARB000001 at EPA-MARB000004-05 (Denial at 4-5).

A. Federal Water Quality Standards Are Extraordinary And Multistate Federal Standards Have Been Promulgated Only *Twice* -- In Wholly Distinct Circumstances.

Consistent with the CWA's assignment of primary water quality standard-setting responsibility to the states, EPA has promulgated federal water quality standards in only two situations: either to redress specific state standards found to be deficient through the Section 303(c)(2) state standard-setting process, or in response to an express instruction by

Congress to promulgate federal standards in lieu of deferring to the states. Neither circumstance is present here.

In the 40-year history of the CWA, EPA has promulgated twelve federal water quality standards.⁹ *See* 40 C.F.R. § 131.31 *et seq.* (“Subpart D-Federally Promulgated Water Quality Standards”). EPA promulgated eleven of those standards for single jurisdictions after “determin[ing] that” the particular state’s standard(s) was “not consistent with the applicable requirements of” the CWA. 33 U.S.C. § 303(c)(3); *see* 40 C.F.R. §§ 131.31-.35; .37-.40; .42-.44. By contrast, in the matter before this Court, EPA has made no such determination regarding the sufficiency of any state’s water quality standards governing nutrients (with the exception of the State of Florida, which is not addressed in Plaintiffs’ claims and is discussed briefly below).

Only twice has EPA ever taken action remotely akin to what Plaintiffs request in their Petition – issuance of federal standards covering multiple states in a single rulemaking pursuant to Section 303(c)(4)(B). In *both* of those exceptional instances -- involving (a) numeric criteria for toxic pollutants and (b) bacteriological criteria for coastal waters -- EPA was implementing express Congressional directives that required the issuance of standards. In the first instance, EPA issued numeric water quality criteria for toxic pollutants in 14 states in accordance with Section 303(c)(2)(B), which *required* the states to adopt “specific numerical criteria for [all]

⁹ By contrast, over the same forty years, states have developed and EPA has reviewed and approved hundreds of state water quality standards. *See* State, Tribal & Territorial Standards: Water Quality Standards Repository, *available at* <http://water.epa.gov/scitech/swguidance/standards/wqslibrary/index.cfm> (providing access to EPA database of water quality standards “that EPA has approved or are otherwise in effect for Clean Water Act purposes”).

toxic pollutants.” 33 U.S.C. § 1313(c)(2)(B).¹⁰ EPA issued its federal criteria only after it became clear that 14 states had failed to comply with the “fundamental 303(c)(2)(B) requirement.” 57 Fed. Reg. at 60848. In the second instance, EPA issued “water quality criteria and standards for the coastal recreation waters” with respect to certain bacterial pathogens after numerous states failed to comply with a statutory deadline to promulgate such criteria that was imposed by Congress’s Beaches Environmental Assessment and Coastal Health Act. *See* 33 U.S.C. § 1313(i)(1).¹¹

EPA has never *once* imposed superseding, national criteria applicable across multiple states, except where specifically directed by Congress. For this Court to *order* EPA to do that for nutrients would be to require unprecedented action that flies in the face of both the statutory framework and the well-established administration of the CWA. As discussed elsewhere herein, Plaintiffs fail to meet the exceedingly high bar of showing that this radical action is indispensable in any state.

B. The Administrator Has Invoked Section 303(c)(4)(B) Where She Deemed It Necessary, And The Experience Demonstrates That EPA Acted Rationally In Declining To Find Necessity Here.

EPA made a Section 303(c)(4)(B) “necessity determination” in 2009 for the State of Florida and subsequently promulgated numeric nutrient criteria for different types of waterbodies in that state. The challenges EPA has encountered in Florida, both before and after its “necessity determination” for numeric nutrient criteria, are of some relevance here. *See* EPA-MARB001039 at EPA-MARB001039 (2009 Necessity Determination at 1). EPA spent many

¹⁰ Congress added this provision to the CWA in 1987. *See* Pub. L. 100-4, § 308(d), 101 Stat. 39, (1987).

¹¹ Congress added this provision to the CWA in 2000. *See* Pub. L. 106-284, § 2, 114 Stat. 870 (2000).

years working closely with the Florida Department of Environmental Protection (“FDEP”) to study the nature of nutrient problems affecting the diverse waters of Florida and to identify effective regulatory solutions. *See id.* By 2009, the State alone had “invested over \$20 million in collecting and analyzing data on the relationship between nutrient levels and biological impacts for purposes of developing numeric nutrient criteria.” *Id.*

In developing numeric nutrient criteria for Florida’s waters, EPA initially began by attempting to establish a “‘dose-response’ relationship . . . which . . . would link nutrient concentrations to the relative risk of environmental harm.” EPA-MARB005847 at EPA-MARB005866 (Fla. Numeric Nutrient Criteria Dev. Plan). After years of exhaustive studies, however, EPA concluded that it could not establish any dose-response relationship in Florida’s streams. As a result, EPA could not use the scientifically-preferred dose-response relationship to identify effective numeric nutrient criteria -- despite a vast database of sampling results and *decades* of study. *See* 75 Fed. Reg. 4,174, 4,194 (Jan. 26, 2010).

Unable to use the well-accepted, direct approach to determine what criteria are necessary to protect against nutrient imbalance, EPA decided instead to utilize a time-consuming and costly “reference stream” approach, in which the Agency looked at nutrient levels in streams selected by the Agency as approximating background or “natural” (*i.e.*, pre-industrial) conditions and extrapolated from those data “safe” nutrient levels for all streams. *See* EPA-MARB004058 at EPA-MARB004073 (EPA Rivers and Streams Guidance at 3). Some questioned the scientific validity of the reference method and whether it constituted a proper methodology for establishing water quality criteria under the CWA. Ultimately, EPA’s numeric nutrient criteria for Florida streams were vacated by a federal district court. The court held that the criteria for streams, which EPA derived using a reference stream approach, were arbitrary and capricious because the

Administrator could not show that the nutrient criteria she chose were tied scientifically to those levels that would, in fact, cause harmful imbalances as a result of excess nutrients. *See Fla. Wildlife Fed’n*, 853 F. Supp. 2d at 1169.¹²

Whatever the merits or wisdom of EPA’s numeric nutrient criteria for Florida, the Florida experience demonstrates the massive effort required to establish federal criteria -- even for one state. Indeed, that effort is still ongoing. With Florida fresh in mind, it can hardly be argued that EPA acted arbitrarily and capriciously in denying a petition to set similar criteria in ten, 31, or 50 states in which EPA has yet even to consider, much less determine, that: (i) nutrients adversely affect specific types of waterbodies of each such state; (ii) each state’s authorities and programs cannot be relied upon to address those specific problems satisfactorily; and (iii) numeric federal criteria will alone accomplish that effectively in each state.

IV. CONCLUSION

In seeking to bypass the prerequisite of a determination that federal rulemaking is “necessary,” as well as the structure and practice of establishing water quality standards on a state-by-state basis, Plaintiffs betray that their action is not one rooted in a legal argument concerning EPA’s faithful administration of its responsibilities under the CWA. Intervenors do not dispute that nutrients can cause water quality problems nor that water quality standards can and should address those problems, where appropriate. The debate joined by Plaintiffs’ Petition and this action is at bottom one of *policy*: plain and simple, Plaintiffs prefer the use of (a)

¹² Intervenors observe that a strict reading of the Court’s holding in *Florida Wildlife Fed’n, Inc. v. Jackson* may suggest that the Court’s concern with this lack of correlation rested upon its belief that EPA’s regulation, by the Agency’s own admission, needed to represent faithful implementation of the “narrative” standard established by the State of Florida. Nonetheless, there is no question that whatever the Court’s *legal* basis for remanding the matter to EPA, the Court found as a matter of *fact* that EPA lacked evidence of correlation between harmful impacts and its criteria.

numeric nutrient criteria issued across the board on a federal level, to (b) the existing programs and approaches of each of the many states that comprise the Mississippi River Basin, which state programs successive administrations of both parties have repeatedly affirmed and approved. That preference does not afford this Court a basis for deeming the Administrator's denial of Plaintiffs' Petition arbitrary and capricious, as a matter of law.

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Louisiana Chemical Association, Louisiana Farm
Bureau Federation, Minnesota Corn Growers
Association, Minnesota Farm Bureau Federation,
Minnesota Pork Producers Association, Mississippi
Farm Bureau Federation, Missouri Agribusiness
Association, Missouri Corn Growers Association,
Missouri Farm Bureau, Missouri Pork Association,*

*Nebraska Farm Bureau Federation, Oklahoma
Farm Bureau, Ohio Corn and Wheat Growers
Association, South Dakota Corn Growers
Association, South Dakota Farm Bureau
Federation, Tennessee Farm Bureau Federation,
Tennessee Pork Producers Association, Wisconsin
Corn Growers Association, Wisconsin Pork
Producers Association, and Wyoming Farm Bureau*

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Counsel for Federal Water Quality Coalition

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Non-State Intervenor-Defendants' Joint Memorandum in Support of EPA's Cross Motion for Summary Judgment and In Opposition to Plaintiffs' Motion for Summary Judgment was filed electronically using the Court's CM/ECF System this 4th day of March, 2013, which sent notification of such filing to the attorneys of record for each party, who have registered with the Court's CM/ECF system.

/s/ Tony G. Mendoza

Tony G. Mendoza